No. 15,216

IN THE

United States Court of Appeals

For the Ninth Circuit

HUNT FOODS, INC.,
Appellant,

vs.

WELLINGTON PHILLIPS and
H. W. LIHOLM,
Appellees.

APPELLANT'S REPLY BRIEF.

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I.

THE STATEMENT OF FACTS.

(Appellee's Brief pp. 2 to 8.)

The whole of the statement of facts by appellee concerns Phillips' *rights*—as developed by Phillips' report of a conversation with a dead man. These rights were never mentioned by Phillips prior to the death of Mr. Flynn, the employee with whom he dealt. In fact, during Flynn's life, Phillips admitted he owed money to Hunt and made no claim of any contract such as that asserted in this action, nor did he make any claim of damages.

There is a notable omission of any discussion of Phillips' *duties*. Nowhere in the brief is there any

discussion of the fact that Phillips could *not* be required to buy anything from Hunt (Tr. p. 232); that he *could* have devoted all of his time and efforts to his bidding and his brokerage business for others or either of these businesses; that more than 75 per cent of his business during the period in question was for others than Hunt; that he had no advertising or sales promotion duties; that he had no requirement of warehousing any stockpiles (Appellee's brief at p. 65 admits that Hunt delivered direct to the commissaries).

The $21,500.00 question here is: If Phillips failed to buy anything from Hunt, if he devoted 100 per cent of his efforts to his other business selling for competitors under his bidding or brokerage arrangements, what could Hunt do? For what damages would Phillips be liable? The answers are: NOTHING! NONE!

II.

THE SPECIFICATIONS OF ERROR.

(Appellee's Brief pp. 8 to 29.)

(a) Appellant's right to interest, attorney's fees and costs (on the appeal from the judgment for appellant).

The brief for appellee cites no authorities whatsoever on the subject of interest and attorney's fees to which appellant is entitled on its cross-complaint.

The amount due to Hunts was liquidated and was represented by negotiable instruments. These instruments were in default (Tr. pp. 50-52). A belated

claim for damages cannot cut off the interest due under the documents. *California Lettuce Growers v. Union Sugar Company* (1955) 45 Cal. (2d) 474 at 487, 289 Pac. (2d) 785 at 793:

> "California Lettuce correctly contends that the mere pleading of unliquidated counterclaims does not render unliquidated an otherwise certain or determinable debt owing to the plaintiff. The unliquidated counterclaims are given treatment as discounts, *not as payments made at the time the debt is due.*" (Emphasis added.)

See particularly:

Muller v. Barnes (1956) 139 Cal. App. (2d) 847, 294 P. (2d) 505;

Cf. *Lineman v. Schmidt* (1948) 32 Cal. (2d) 204.

Appellant's counsel successfully proved the allegations of the cross-complaint. The complaint did not admit any setoff or cross-demand. Hunt, therefore, was required to bring suit on the trade acceptances for the amount due. The trial Court was empowered to award attorney's as called for in the instrument (*Kirk v. Culley* (1927) 202 Cal. 501 at 508 to 509).

(b) Findings as to the nature of the arrangement. (Appellee's Brief p. 9.)

In our opening brief at page 9, we pointed out that there was no basis for a finding, that Phillips agreed to perform the "duties and obligations of an exclusive military jobber." There is no transcript reference suggested by appellee to support such a

finding. Where is the evidence of what those duties were? Do such duties include the right to devote all a person's time to the business of others without liability therefor?

Appellant's opening brief sets forth the facts pertinent to this question at pages 8 and 9 and the law applicable at pages 18 and 19.

(c) Findings as to estoppel. (Appellee's Brief pp. 12-13.)

Reduced to its essentials, appellee's argument is that, to some extent, part of the quarter of a million dollars of sales done by Phillips in his bidding business was due to bids made before the end of 1951. But Phillips testified that in the bidding business (Tr. p. 366): "You get your forms in December and you start delivering in January." The Hunt arrangement started December 1, 1951. Phillips also testified (Tr. p. 171): "in the bidding business you buy something and sell it; you have your gross immediately."

(d) Findings as to performance and breach. (Appellee's Brief p. 14.)

Phillips' discussion (p. 17), of the balance due at time of termination is surprising in face of Phillips' own admission (Tr. p. 131) that he owed Hunt about $25,000 at the time of termination. The further proof of this is found in the credit ledger from Hunt's records (Exhibit AN). The evidence showing that Phillips was 4 to 5 months in default is set forth in part 1 of the appendix to our opening brief. The last few pages of Ex. AP show clearly the delay in payment.

It is difficult to follow appellee in the discussion of the facts under this heading. For instance he says, at page 14 of the brief, that there was no discussion by him of a credit limit but, at page 11 of the brief, he says the limit of credit was $5,000.

Appellee suggests that the position taken by Hunt would require Phillips to finance Hunt sales. The evidence is uncontradicted that Hunt sold to Phillips, a purchaser who was free to resell at any price if he wanted. The sales to the commissaries were *Phillips'* sales, *not Hunt's.*

Considerable space is devoted by appellee to discussing some orders at two bases which Hunt salesmen had made and turned over to Phillips to process. His brief *assumes* that these orders had been recently placed, yet there is no evidence as to *when* the orders were placed. The orders may have been placed much earlier and may have been ready for payment at the time. At all events Phillips, his counsel and the Court said they were *de minimis* (Tr. p. 516). There is no basis in the record for appellee's statement that Hunt was making Phillips finance these particular sales. (Incidentally, the two bases were assigned to Phillips in December, 1951—why hadn't he sold them prior to October of 1952? Perhaps he was too busy with his non-Hunt business.)

Appellee's statement of the government's delay in paying is incorrect. The evidence on this matter is set forth in part 1 of the appendix to our opening brief. With respect to appellee's comments on the billing practices of Hunt, it must be pointed out that the

uncontradicted evidence is that the practice of treating invoices in default after 10 days is a custom peculiar to the canning industry but known to everyone in the business (Tr. pp. 488 to 489).

(e) Findings as to the nature and origin of damages. (Appellee's Brief pp. 19 to 21.)

Appellee's brief fails to discuss the question of *causation* of damage; yet it is the burden of appellee to prove causation of damage here as in any other case (see appellant's opening brief p. 13 and pp. 35 to 36). Apparently appellee feels that Finding VIII (submitted by him) is of no importance.

The gist of appellee's case and of the findings is that lack of capital and inadequate credit resources prevented Phillips from continuing in a profitable business, but appellee stipulates in his brief (p. 10, lines 8 to 11) that the Hunt business was **NOT** the cause of Phillips' inadequate credit resources. This stipulation is a direct and categorical denial of the allegations of paragraph IX of the complaint which appears at page 13 of the transcript.

Appellee discounts Phillips' own letters which boast of his prosperous bidding business after termination, all of which letters were in evidence, by the amazing device of stating that Phillips lied in those letters.

(f) Findings on the issue of Hunt's knowledge of the contract. (Appellee's Brief p. 21.)

In our opening brief (pp. 14 and 15) we pointed out that there is no evidence to support a finding that any Hunt executive officer knew of such a contract

as that found by the Court. Appellee fails to designate any evidence to support a finding that Hunt knew of the contract. He argues only that there is no proof that the officers of Hunt didn't know about the contract, yet the burden is on Phillips to show knowledge of the contract in question on the part of executive officers. The law, popularly known as the "Equal Dignities Rule", is discussed at pages 30 to 34 of our opening brief, and infra in this brief under that heading.

(g) Findings relative to the basis for determining damages.

Appellee at page 23, line 24, of his brief acknowledges that sometimes a profit is made because of market price changes. This does not strike us as unusual, nor did it strike the trial Court as unusual (Tr. p. 123). And it indicates further that profits can't be predicted. That some commissary officers stated they were "ready" to buy Hunt products is not proof that the purchasing officer *had* ordered or agreed to buy Hunt products. This evidence is discussed in detail at pages vi and vii of the appendix to appellant's opening brief. The findings do not give *any* clue as to the basis for awarding damages.

The brief hints (p. 24, line 17) that at Alameda 54 food items were introduced. Phillips testified (Tr. p. 147) the highest number of items at any place at the time of termination was 35; that the figure of 55 at Alameda included items *and* sizes (thus peas, which come in two different sized cans, give a figure of 3, one for the item and 2 for the different sized cans; (Tr.

p. 272)); that the number of items sold at a place varied from month to month, sometimes less than half the previous month (Tr. p. 299).

Appellee continues to make assumptions (brief p. 25, line 24) and estimates (brief p. 25, line 26) of volume instead of proving actual experience. At pages 26 to 28 of his brief, appellee, in discussing damages, estimates profits he would have made immediately after termination. But when he discusses estoppel he says he was bound to lose money for a number of years! (See p. 38 of appellant's opening brief.)

Hopes become facts easily for appellee. Thus a commissary officer's statement that he "intended" to take on the Hunt line at some time in the future, if other competitive lines were eliminated becomes (brief p. 28, line 20) a "last minute acceptance of the full line."

Appellee's discussion of the alleged proof of damages (pp. 27 to 30 of his brief) is notable for the absence of any citation to the transcript. Most of his statements have no support at all in the record. Thus, at page 28, line 4 he says that his traveling expense amounted to $6500.00 (a figure repeated in his brief at page 65, without transcript reference). **There is not a word in the record of traveling expense of $6500.00 or any other amount.** In the next line he says one clerk at a salary expense of $3600.00 a year could handle the clerical work—**yet there is no evidence whatsoever as to what a clerk is paid or whether one or more clerks would be needed.** There is no citation of pages of the transcript to support the statements in the brief.

In this portion of the argument the brief of appellee again refers to sales volume at other bases as being seven times greater than the volume at Alameda. The absence of any foundation for this estimate is demonstrated at pages v to vi of appendix to appellant's opening brief. This section of the brief is replete with unfounded future prophesies. Thus at page 28, he says that *when* a greater number of items of Hunt *would be* established at the bases, the volume at the bases would be a certain amount. The record shows that at many of the bases there were only one to four items on the shelves and that the number of items varied from month to month (Tr. p. 299).

On page 29 of his brief, Phillips gives himself a $40,000.00 gross profit if he had continued another year and a $30,000.00 net profit. This assumes, among other things, a $10,000.00 expense but where is the evidence of expense? There is no evidence of what his expenses were and these figures are invented by the brief writer to avoid exposing appellee's fatal defect in proof. (Appellant's brief p. 39.) Further reference to the fact that these figures are invented for the purpose of the appellee's brief is made under Section 8 of the argument hereinafter.

III.

ARGUMENT.

1. THE REASON FOR TERMINATION NEED NOT BE STATED.

This point, set forth in our opening brief pages 17 and 18, is apparently conceded by appellee.

2. THE NATURE OF THE AGREEMENT.

The argument of appellee on this subject rests on the ground that he felt he was bound to lose money for some years and that therefore the contract was to last for those years. But when he argues on the question of damages he claims that after 15 months he was moving into a most profitable era.

The cases cited in our opening brief at pages 18 and 19 are decisions from the United States Supreme Court and from the 4th, 6th, 7th and 8th circuits involving facts substantially similar to those here involved. Appellant's offer of proof as to the industry custom of making jobber agreements terminable at will was rejected (Tr. 505-506).

See also *Ruinello v. Murray* (1951), 36 Cal. (2d) 687, 227 Pac. (2d) 251, cited at page 18 of our opening brief.

Under the law, if a plaintiff's employment is based on a consideration "other than the services to be rendered" and unconscionable injury would result by termination at will, the employment cannot be terminated at will (*Ruinello v. Murray,* supra). Both elements must be present but here there is neither unconscionable injury nor an independent consideration.

Phillips was not *required* to give up any other business. Even if that were so, abandoning other interests in order to serve a party is not a consideration entitling a plaintiff to a continuance of his employment (*Thatcher v. American Foundry* (1947), 78 Cal. App. (2d) 76, 177 Pac. (2d) 332. See also cases cited in

our opening brief at pages 24 and 25.) Appellee quotes (appellee's brief pp. 33 and 34) from *Millet v. Park & Tilford,* a District Court case. The Court there acknowledged the rule that the consideration given by the plaintiff must be *"other than the service to be rendered by the employee or agent;* the Court itself italicized those words and it found that: (a) Millet, the plaintiff, had agreed to buy defendant's products. Phillips did not. (See our opening brief p. 9). (b) Millet was required to maintain warehouse facilities—Phillips was not because, as admitted by appellee at page 65 of his brief, *Hunt delivered the merchandise directly to the commissaries.* (c) Millet tied up substantial amounts of its capital in inventory and accounts receivable. Phillips did not. He put no capital into the Hunt operation but operated on Hunt monies over the protests of Hunt. The accounts receivable were assigned to Hunt (Exhibit E) to protect Hunt, but Phillips paid no attention to the assignment (appellant's opening brief appendix p. ii).

In the *Millet* case, as shown by the quotation on page 34 of appellee's brief, the Court held that *these three just mentioned factors were the necessary additional considerations to prevent termination at will.* But *none* of these factors are present in the case at bar.

The appellee's brief fails to show what "considerations other than the services rendered" were undertaken by Phillips—how did his engagements differ from the illusory considerations given by the plaintiffs in the cases cited in our opening brief at pages

20-21, such as *Hoffman v. Pfinsten,* Wis. (1951) 15 N.W. (2d) 369, 26 A.L.R. (2d) 1132, and *Dupont v. Claiborne* (8th Circuit 1933), 64 Fed. (2d) 225.

The only claim made by Phillips as to "unconscionable hardship," is that at the time of termination his credit and capital were low. His brief, page 20, line 8, admits this was not caused by Hunt. As shown on our opening brief pages 12 to 14 there is no proof that his credit or capital condition deteriorated or, if so, was due to the Hunt operation.

Furthermore, the loss of greater benefits is not unconscionable hardship. (*Jirschik v. Farmers and Merchants Bank* (1951), 107 Cal. App. (2d) 405, 237 Pac. (2d) 49.)

Appellee also relies upon *Noble v. Reid-Avery* (1928), 89 Cal. App. 75, 264 Pac. 341, which is not at all in point. There the plaintiff had bought a large quantity of welding rods and defendant agreed not to sell similar rods in plaintiff's territory until the plaintiff had sold all the rods. Defendant did sell similar rods in the area while plaintiff still had a supply on hand. The Court said that plaintiff's obligations had been fully executed (appellee acknowledges this fact later in his brief at p. 38).

3. THE MUTUALITY QUESTION.

(Appellee's Brief pp. 36 to 41.)

In our opening brief (pp. 10 and 20) we showed that Phillips did not agree or otherwise bind himself to give up any business. He did not agree to maintain a stock of goods in inventory and this is acknowledged in his brief, at page 65, where he admits that Hunt delivered for him direct to the commissaries.

On the question of mutuality, the principal authority submitted by appellee is *Tuck v. Gudnason* (1936), 11 Cal. App. (2d) 626, 54 Pac. (2d) 88. This case is described in 3 *Standard Law Review* 294 as unusual in the extremely great detriment that would have been suffered by plaintiff if the contract were not enforced. In that case the plaintiff was a Chinese woman who operated a small hemstitching and dressmaking shop. Defendant, a manufacturer, promised that (a) if she would *abandon* her business, (b) devote her time to working for defendant *exclusively,* (c) make dresses for no one else, (d) if she would lease larger premises for 5 years and (e) install expensive new equipment, all at plaintiff's expense, that defendant would employ her and her equipment for 5 years. All this the plaintiff did but defendant refused to perform. The points of distinction between that case and the case at bar are numerous and obvious. It should be observed that this decision reversed a nonsuit and in the re-trial judgment was for defendant (26 Cal. App. (2d) 468).

Brunvold v. Johnson (1939), 36 Cal. App. (2d) 226, cited at page 37 of appellee's brief: the Court there

points out, that the defendant's answer admitted that plaintiff had been employed as an agent "for a valuable consideration." Since mutuality is a question of consideration, this is an admission by the pleadings of mutuality. The Court therefore said that *the issue in dispute was not mutuality* but whether a change in the commercial relations between the United States and Philippines affecting cordage was a sufficient contingency to warrant termination of the contract. It may also be noted that in the *Brunvold* case the plaintiff, a former salesman, for defendant, was devoting his full time to the sale of defendant's cordage products.

Noble v. Reid-Avery was the case of an executed contract so the question of mutuality was not involved.

In *J. A. Folger & Co. v. Williamson* (1954), 129 Cal. App. (2d) 184, 276 Pac. (2d) 645, the Court at page 187 of the official report said:

> ". . . We do not consider that an agreement to tender 'as many of its shipments as its general business and market conditions will warrant' furnishes an objective test . . ."

(This is what Phillips says *his* agreement was.)

Hoffman v. Pfinsten (Wis. 1951), 50 N.W. (2d) 369, is cited at page 20 of our opening brief and is a case virtually on all fours with the case at bar. The language of the contract in that case is set forth in 26 A.L.R. (2d) at 1133. A reading of the language there shows that appellee has not understood the case.

The only answer appellee has to the case of *Friedman v. McKay Leather Co.,* quoted at pages 20 to 21 of our opening brief, is that the Court said that that case differed materially from an exclusive agency. *But the distinction was made in connection with the discussion of the question of* **damages,** *not with respect to the question of* **mutuality.** The case involved a claim for commissions on sales made by defendant in plaintiff's territory and of course the damages are far more certain if the plaintiff had an exclusive than if he did not. Where he did not have an exclusive his damages are necessarily speculative because other agents would have made the sales, said the Court.

Misquotation of authority by appellee.

E. I. du Pont de Nemours v. Claiborne (Cir. 8, 1933), 64 F. (2d) 224 is discussed in some detail at page 21 of our opening brief. In appellee's brief at page 39 he **purports** to quote verbatim from the contract there involved and then states that the quoted words make the contract, "by its terms," expressly terminable at will. **But this quotation is NOT from the contract**—rather, the quotation is a portion of the Court's summary of the legal position of the plaintiff which parallels Phillips' here and which there resulted in judgment for defendant. The opinion sets forth the contract involved in full; it contains **none** of the language quoted by appellee, nor any similar language. **Furthermore, the quotation of the Court's language is also inaccurate, in that it omits key words to change the meaning.** In that case the Reno Com-

pany was the plaintiff-distributor and du Pont the defendant-manufacturer. Compare the actual quotation with that given by the appellee in his brief and note where the appellee puts *his own* underscoring.

Language as used by Court:	**Quotation by Appellee:**
"Reduced to its lowest terms, the claim of the Reno Company . . . was an agreement that it should be the sole distributor . . . so long as the du Pont Company was satisfied with its services and so long as it (the Reno Company) chose to perform the services." (Underscoring ours.)	"So long as the du Pont Co. was satisfied . . . and so long as it chose to perform" (Underscoring appellee's.)

NOTE: The key words in the parentheses after the word "it" were omitted by appellee, which, with his underscoring, reverses the meaning.

In distinguishing other cases cited by us the appellee argues that in them the plaintiffs did not offer "other considerations," inferring that Phillips did but, as noted above in discussing the *Millet v. Park & Tilford* case, there were no "other" considerations offered by Phillips.

The discussion in appellee's brief (p. 41) of our argument that the sales to commissaries was a new business for Phillips, completely misses the point. The point is whether the business was new to *Phillips, not* to Hunt. Phillips himself admitted that this type of business was new to *him* and was a "drastic change" (Tr. p. 168).

4. THE STATUTE OF FRAUDS.

(Appellee's Brief pp. 41 to 49.)

(A) CASES CITED BY APPELLEE.

The cases cited by appellee are patently distinguishable.

Berkey v. Halm (1950) 101 Cal. App. (2d) 62, 224 P. (2d) 885: The plaintiff quit entirely his insurance business, turned over all his client's and his business to defendant in exchange for the promise of a salaried position with defendant and for some stock in the defendant corporation. The defendant assured the plaintiff he was the owner of the shares and that defendant had performed. Later the defendant refused to recognize the agreement and discharged plaintiff. The stock had never been transferred to plaintiff. Thus, the plaintiff ceased all other work and gave up *all* his business to defendant who deliberately defrauded him. The acts of deliberate fraud are frequently mentioned by the Court in its opinion.

Monarco v. Lo Greco (1950) 35 Cal. (2d) 621, 220 P. (2d) 737: The plaintiff devoted his life to working on his stepfather's land on the oral promise of receiving the property by will. As a result of plaintiff's efforts the value of the property increased from $4,000.00 to $100,000.00. From the start plaintiff was dissuaded by his stepfather from purchasing similar property and improving it for himself. The stepfather executed the will and showed it to the plaintiff and then secretly revoked the will. This case therefore involved the following elements none of which

is present in the case at bar: The actual and deliberate fraud of the stepfather; the gross unjust enrichment of the stepfather; quantum meruit would not lie because of the peculiar nature of the services involving continuation of a close family relationship. The Court itself limited its decision to the very special situation before it and, at page 626 of the official reporter, the opinion points out that it rests upon the fact that the services were of a peculiar nature involving the continuation of a close family relationship.

Tuck v. Gudnason (1936) 11 Cal. App. (2d) 626, 54 P. (2d) 88, is the Chinese dressmaker case discussed above. That case involved a nonsuit, and on retrial judgment was for defendant (26 Cal. App. (2d) 468). As noted there, the plaintiff gave up all of her business, signed a long lease, bought expensive shop equipment and devoted her full time to defendant.

Holsten v. Mullen (1927) 84 Cal. App. 1, 257 Pac. 545, has no bearing whatsoever on the question involved in the case at bar. That case concerned *joint venturers,* one of whom, the defendant, took a lease under his name alone for both parties and with the funds of both parties added improvements to the premises. The Court decided the case on the doctrine of part performance (p. 4 of the opinion). Part performance *does* apply to joint venture agreement (49 *Am. Jur.* 793) but does *not* apply to contracts which are not to be performed in a year (49 *Am. Jur.* 798; 6 *A.L.R.* (2d) 1067).

Roberts v. Wachter (1951) 104 Cal. App. (2d) 281, 231 P. (2d) 540: This case involved only the sufficiency of a pleading as against demurrer. The complaint alleged plaintiff by written contract had waived his right to sue in quantum meruit. The Court stresses the fact (pp. 286 and 289 of the opinion) that this waiver would prevent him from recovering the reasonable value of his services.

Sessions v. Southern California Edison Company (1941) 47 Cal. App. (2d) 611, 118 Pac. (2d) 935: The plaintiff was told by his employer that he could quit work without losing his rights to a pension, as of the time he came to the age of retirement. The pension plan of the defendant company was later changed to require continuous employment up to the age of retirement. The Court found that the employee would not have ceased his employment except for the promise of the employer and that he would have been able to work up to the age of retirement. The plaintiff therefore irrevocably lost a prior right which he had no means of recovering if the statute of frauds were allowed as a defense, because he had given up his pension rights irretrievably. This case is described as "unique" in 3 S.L.R. 294.

There is no evidence that the Hunt operation caused depletion of Phillips' capital or credit. He says (appellee's brief p. 45) that the loan of $12,000.00 to his limited partner would not have been made *if* he had known of the prospective termination. There is no evidence to support this statement. On the contrary, the evidence shows that Phillips lent the money to his

partner because the limited partner was in Federal tax difficulties (see discussion at p. 13 of our opening brief).

(B) APPELLEE'S TARDY ASSERTION OF A MEMORANDUM SATISFYING THE STATUTE.

Appellee now takes the position that plaintiff's Exhibit 3 is a written memorandum of the oral agreement. No such assertion was ever made until after the close of the trial. There is *no finding by the trial Court* as to a memorandum.

(a) The alleged defense cannot now be raised.

Each count of the complaint (Tr. p. 10 and p. 15) alleges an oral agreement violative of the statute of frauds. It was therefore incumbent on the plaintiff to plead facts which lift the contract from the statute (*Palmer v. Phillips* (1954), 123 Cal. App. (2d) 291 at 295, 266 Pac. (2d) 85). But Phillips *did not plead any memorandum.* The complaint relies on estoppel, which is not necessary if there were a memorandum. Since there is no allegation in the complaint as to any memorandum, his case must rest on estoppel alone, as did the lower Court's findings.

(b) Exhibit 3 was not introduced into evidence as a memorandum.

Plaintiff's Exhibit 3 was introduced in evidence as a calling card by which Phillips might make himself acquainted at the commissaries (Tr. p. 115). If it had been introduced as a memorandum under the statute, then parol evidence would be inadmissible to explain

it. (23 *Cal. Jur.* (2d) p. 357; 49 *Am. Jur.* 636; *Ellis v. Klaff* (1950), 96 Cal. App. (2d) 471, 216 Pac. (2d) 15). No objection was made to testimony regarding the oral agreement but objection *could* have been made under the parol evidence rule *if* defendant were advised by the pleadings, or otherwise, that Phillips was asserting that this introductory notice was a memorandum satisfying the statute. Plaintiff's whole case was based on estoppel, not on a memorandum. The attempt now to describe Exhibit 3 as a memorandum is a recognition of the failure to prove estoppel.

(c) The alleged memorandum was insufficient.

In any event the alleged memorandum was incomplete. It fails to state the price, the duration, the terms of payment, or the bases to be covered (49 *Am. Jur.* 665). A memorandum must contain all the essential terms of an agreement.

Edgar Brothers Co. v. Schmeiser Manufacturing Co. (1917), 33 C.A. 667, 166 P. 366, held that a memorandum made in April 1912 which stated that plaintiff was "to have exclusive agency in Imperial Valley for 1912, and by ordering one car before February 1, 1913, can have the agency for same season," was insufficient to satisfy the statute because of incompleteness and uncertainty. (See also *Ellis v. Klaff* (1950), 96 Cal. App. (2d) 471, 216 Pac. (2d) 15).

(d) The alleged memorandum was not signed by Hunt.

If appellee relies upon a memorandum, he must prove the authority of Flynn to sign (49 *Am. Jur.* 704; *California Civil Code* 2309). Phillips admits that the

jobber arrangement was a "unique" one for Hunt (Tr. p. 446) and his brief (p. 7) admits Hunt never had similar agreements. Therefore Flynn's written authority must be proved by appellee (see discussion pp. 30 to 34 of our opening brief). The record shows it was never authorized by anyone superior to Flynn (Tr. p. 421).

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5. ANY TERM, INDEFINITE OR NOT, WHICH IS FOR MORE THAN A YEAR IS WITHIN THE STATUTE OF FRAUDS. (Appellee's Brief pp. 49 to 51.)

Appellee makes virtually no argument on this subject. This is understandable in view of the decision by the Ninth Circuit in *Fibre Board Products v. Townsend* (1953), 202 Fed. (2d) 180, discussed at p. 28 of our opening brief.

The distinguishing facts in the case of *J. C. Millett Company v. Park & Tilford* (1954), 123 Fed. supra 484, a case frequently cited by appellee have been shown previously herein. The decision in that case held (p. 493) that the arrangement was for an indefinite duration of one year terminable by three months' notice.

> "Weighing the substantial outlay of money by Millett in taking on the distributorship and the difficulty in getting a distributorship started against the large economic stake Park & Tilford had in giving over the distribution of its products, I find from all the facts that one year is the reasonable period of time before which termination could not be effected. Bearing in mind the average inventory maintained by Millett and the

> average depletion of that inventory as well as the other facts, I find that three months is a reasonable period of notice. Thus the distributorship could be terminated at the end of one year by three months' previous notice or after such notice at any subsequent time."

None of the factors mentioned in the *Millett* case is present in this case.

The statute of frauds is designed to protect a defendant in the case like this where the plaintiff waits until an employee is dead and then claims he entered into some "unique" contract with the dead man. While the employee Flynn was alive, Phillips never claimed any contract but, on the contrary, admitted his own liability to Hunt and sought time to clear up those liabilities.

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6. THE EQUAL DIGNITIES RULE.
(Appellee's Brief pp. 51 to 54.)

In our opening brief, page 30 to page 34, we discussed the law which requires proof of written authority of an agent to enter into a contract such as that found by the Court. At page 15 of that brief we set forth the facts material to this question. We pointed out that some cases make exceptions with respect to *executive officers* of a corporation on the theory that those are the people who are the corporation in so far as contracts are concerned. That exception does not apply here because no executive officer of Hunt knew of any contract such as that found by the Court.

Appellee does not claim that Flynn (or Miller) was an officer of Hunt. He argues only that they must have been some sort of executives. But the exception applies only to executives who are *officers.* Neither Flynn nor Miller were officers and neither were executives of Hunt. (We fail to see how Miller comes into it at all since Phillips testifies that the whole agreement was made with Flynn) (Tr. p. 170). Appellee's brief page 51 states that Flynn "must have" told Miller about the arrangement but this is appellee's guess only, without support in the evidence. He also states that the officers of Hunt "must have" known there was some arrangement with Phillips. This, again, is but a guess without support in the evidence and even that guess is not enough, under the rule in *Seymour v. Oelrichs* (1909), 156 Cal. 782 at 791, 106 Pac. 88 at p. 92, discussed, with other cases, at pages 32 and 33 of our opening brief.

Murphy v. Munson (1949), 95 Cal. App. (2d) 306, 212 Pac. (2d) 603, is cited by appellee. In the first place that case did not involve a corporation so it has no bearing on the question of the power of corporation employees. The case is quite different in other respects. It involved a document (1) signed by the defendant's amanuensis (2) at the defendant's specific request and (3) the document was ratified and confirmed in writing by the defendant (4) with "full knowledge of the entire transaction and of all communications with the plaintiff."

The case of *West v. Wall Prather Company* (1907), 7 Cal. App. 81, cited by appellee, is manifestly differ-

ent from this case. There the president of the corporation terminated the plaintiff's lease and the corporation executed a new lease with others. Thus the action was that of an executive officer, the corporation knew the lease had been cancelled by the president and so, in executing a new lease, held out the president as authorized to terminate the plaintiff's lease.

The Ninth Circuit opinion in *E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (1938), 97 Fed. (2d) 402 at pp. 408 and 409 controls on this point.

> "We need not here decide what rule is applicable in a case involving an executive officer of a corporation, for there is no testimony in the record before us from which it may be inferred that Carl R. Moore was an officer of appellee corporation."
>
> . . . In this case there is no evidence from which it could be inferred that appellee represented either that its agent had written authority or that it would not avail itself of the defense of the statute. . . ."

(Other quotations from this case are at page 31 of our opening brief.)

Appellee's brief at page 7, lines 20 to 22 *admits* that:

> **"The Phillips arrangement was unique—Hunt had no similar arrangement with any other person or firm in any district."**

This quotation from the appellee's brief renders incongruous his argument at page 53 that the arrangement was usual in the ordinary course of business.

The above quoted admission by appellee makes unnecessary any further elaboration on the question of ostensible authority discussed in our opening brief page 33.

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7. THE ARGUMENT ON DAMAGES.

(a) Cases cited by appellee are not in point.

Natural Soda Prod. Co. v. City of L. A. (1943), 23 Cal. (2d) 193, 143 Pac. (2d) 12, was a tort action. The defendant city flooded plaintiff's property causing severe damage to its manufacturing plant. Plaintiff had operated a salt plant for 5 years in a dry lake bed and then undertook to convert it so as to increase production. The city diverted the river and flooded the whole lake bed damaging the plant and reducing the value of the salt beds. The Court held that a basis for prospective damages was established because the sales of plaintiff in the preceding 5 years were stable; detailed figures were introduced of all his actual expenses; and the capacity of the converted plant had been increased to a specific tonnage per day over the known production of the old plant (Phillips admits that his profits varied from base to base and from time to time depending on the state of competition and other factors and he made no attempt to show what his expenses were).

Sobelman v. Maier (1927), 203 Cal. 1, 262 Pac. 1087, cited at page 55 of appellee's brief was an action against a purchaser who had agreed to buy a specified number of the plaintiff's products at specified prices.

This is a rather clear case in which damages can be determined by elementary arithmetic.

In *Bunbaum v. G.H.P. Cigar Company* (Wis.) (1925), 206 N.W. 59, 188 Wis. 389, cited at page 56 of appellee's brief, the plaintiff planned to give up the agency because he was losing money and the defendant urged him to continue, assuring him that business would increase. Defendant's own employees determined the sales policy for plaintiff. When the market changed for the better, defendant terminated the agency and commenced selling the cigars itself. The plaintiff's evidence in that case set forth in detail the sales made by defendant for one year after termination and the expenses of sale and the damage awarded was based on the net that defendant actually made in the year after termination. This is obviously quite different proof than that produced by Phillips. The 1951 Wisconsin case, of *Hoffman v. Pfinsten,* cited earlier in this brief, represents the law applicable to the facts here.

Jegen v. Berger (1946), 77 Cal. App. (2d) 1, 174 Pac. (2d) 489: The plaintiff, who was an operator of a laundry, sued for loss of business due to sale to him by defendant of a defective mangle. The evidence showed that a new mangle had capacity of 18 to 20 feet a minute and he knew the capacity of the old mangle. Therefore, plaintiff was allowed to testify that the defective new mangle operated at only 25 per cent capacity. The plaintiff knew the amount of business he could handle and therefore could estimate what business he had to turn away. This proof was

obviously more than a guess. In fact, the court pointed out that: "It is a matter of common knowledge that during the war years laundries had more business than they could handle." Therefore, in that case, the Court knew the business that could be done if the mangle were 100 per cent efficient and, so, could determine the loss resulting from a mangle that operated at only 25 per cent capacity.

(b) Prospective damages not awarded to a new enterprise.

California decisions pertinent on this question are set forth in our opening brief pages 34 and 35.

In 26 *A.L.R.* (2d) at p. 1141, a recent annotation, it is stated:

> ". . . the majority of the later cases which consider the question (hold) that such a contract is uncertain and unenforceable unless the business was started *prior to the execution of the contract* . . ." (Emphasis added.)

(c) The best possible proof was not introduced. (Appellee's Brief pp. 58 to 60.)

Appellee apparently feels that it is up to defendant to prove the plaintiff's case. He says the invoices were in Court, implying that it is the duty of defendant's counsel to sift through cartons of jumbled invoices which he himself had not separated or summarized. The transcript, at pages 153 and 293, reflects how disarranged the invoices were. In fact, it will be noted that (Tr. p. 153) the direct examination of Mr. Phillips was interrupted because the plaintiff's evidence on damages was not in shape for presentation.

The 1952 income tax return of the appellees was amended by their accountant three years later (in 1955) because it wasn't until then that some of the 1952 invoices were brought to the accountant's attention (Tr. p. 387).

Appellee's summary of *Warner v. Channel Chemical Company* (Wash. 1922) 208 Pac. 1104 is erroneous. He says that the contract there involved terminated "in *early* 1920" but the facts actually were that the termination occurred sometime after September of 1920, which is hardly the "early" part of the year. In that case the record of sales in 1918, 1919 and 1920 were before the Court. The Court noted that the contract called for a 10 per cent increase in volume each year which plaintiff had more than met. The trial occurred in the middle of 1921 and the 1921 sales data to date of trial were in evidence. The Appellate Court held that damages could be assessed on the basis of the 1921 sales *only* but that no opinion evidence should be permitted as to estimated 1922 sales. The trial judge had said he could find that the 1922 sales would equal the 1921 sales but the appellate Court held that this would involve the same amount of speculation as if he were to say that the sales would have increased in the next year. Appellate Court held that *any* opinion as to 1922 sales would be speculation. The upper Court said of the trial Court:

> ". . . But he further held that in 1922 respondent could have equaled his 1921 sales. This, it seems to us, is as much a speculation as it would have been to have held that the sales could have been increased. While, if respondent lived and

kept his health, he would undoubtedly have made sales in 1922, yet it seems to us that that time was too far in the future, and its possible conditions too much dependent upon what might happen, to permit anyone to say with reasonable certainty what sales could have been made. Since the prospective sales for 1922 could not be determined with reasonable certainty, no recovery on account thereof can be allowed."

(d) Appellee's guesses and speculations are not evidence.

The material set forth on pages 60 and 61 of appellee's brief is pure guess and speculation unsupported by the evidence. There are, of course, no transcript references. There is no evidence upon which sales at Alameda Naval Air Station can be compared with sales at other commissaries. See, for instance, Phillips' testimony under cross-examination (Tr. pp. 322 to 323) where he admits that he started selling to Fort Ord in December 1951, but that the sales varied tremendously and that the number of items sold to Fort Ord were not consistent during the year 1952 and that the same was true of Hamilton Air Field. Even Phillip's estimate of the percentage of gross profit he might make is based on so many contingencies that his testimony is, in the language of President Franklin Roosevelt, exceedingly "iffy" (Tr. p. 320, lines 8 to 14).

The whole case of appellee is based on assumptions as to what he sold to commissaries without proof of his actual volume (For example, Tr. pp. 313 to 315). The detail is set forth in Part II of the Appendix to appellant's opening brief.

The weakness of Phillip's claims with respect to his performance is illustrated by a colloquy between the Court and Phillips himself. (Tr. 123.)

> "The Court: . . . you sold him some kind of a commodity later on and because there was a change in the market conditions you made more profit, is that right?
>
> "The witness: Yes, Sir.
>
> "The Court: What is extraordinary about that?"

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8. FAILURE TO PROVE EXPENSE OF DOING BUSINESS.
(Appellee's Brief p. 65.)

For the second time in his brief appellee says that his traveling expense was $6500.00 in the year 1952. The other occasion was at page 28 of the brief mentioned earlier herein. Again, he cites no page of the transcript. **There is no evidence of any traveling or other expense in the whole record in this case.** The record shows that (Tr. p. 131) the largest item of expense was traveling and billing but *no amounts* were ever given. Phillips' statement in the brief that increased volume would not require more than one office clerk has no foundation in the evidence. Here again, of course, there is no citation of the record by appellee. This is pure invention on the part of the brief writer.

At page 65 of his brief appellee also says that the expense of handling the Hunt business was "about $10,000" and *there is no evidence whatsoever on this point.* Similar misstatements are elsewhere made in the brief and are referred to in earlier sections of this brief.

Thus the fatal lack of proof referred to on our opening brief at page 39 stands established for lack of an answer by appellee. In this portion of opposing counsel's brief he substitutes his guess to supply figures at which even his client would not guess.

The case of *Lewis-Hale Co. v. Enterprise Fuel Company* 4th Circuit (1929) 33 F. (2d) 727 at 730 is quoted at page 38 of our opening brief and has not been distinguished by appellee.

IV.

CONCLUSION.

On the damage question, Phillips has failed to introduce any evidence of his expense of doing business. He did not show the business he actually did as a basis for estimating future profits but contented himself with substituting guesses as to the actual sales volume during the time he handled the Hunt line. To this fictitious volume he applies a percentage of profit that had no relation to the profit he actually made.

When arguing that he has suffered unconscionable hardship to qualify for the estoppel he claims he was operating at a loss; but when he argues damages he claims he had just reached the era of highest profits.

He has not been able to show that any executive officer of Hunt Foods knew of any such arrangement as that which Phillips claims he made with the dead man, Flynn. This is part of his proof which he neglected.

On the question of mutuality, Phillips has failed to show that he had any obligations. The evidence shows that he was free to and did devote as much time as he wished to other businesses.

The arrangement was terminable at will and was actually terminated for good cause. Phillips was in default virtually from the start of his dealings in this new type of business.

It is apparent that Phillips never had the financial resources to handle this type of business. The more sales he made the greater his debt to Hunt. If he could have sold the volume he predicts in his brief, Hunt would have to finance him for months with sums exceeding $150,000.00. His delay in payments became greater with each passing month. Hunt never agreed to be his banker.

On the Hunt cross-complaint, the admitted debt was due in October and November 1953 and the judgment for appellant should include interest thereon and attorney's fees.

Dated, San Francisco, California,
January 10, 1957.

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